Office - Supreme Court, U.S.
FILED
JUL 30 1983
ALEXANDER L. STEVAS,
CLERK

CASE NO. 83-148

In The

Supreme Court of the United States

October Term, 1983

THERESSA R. JOHNSON,

Petitioner,

– versus –

DISTRICT SCHOOL BOARD OF HERNANDO COUNTY, FLORIDA

Respondent,

TITLE VII, CIVIL RIGHTS ACT OF 1964, RACIAL DISCRIMINATION AND DISCRIMINATION IN GENERAL IN EMPLOYMENT TERMINATION,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR CERTIORARI

Counsel(s) For Petitioner
None
Proceeding Pro - Se
810 Saint Francis Street
Brooksville, Florida 33512
Telephone: (904) 796-2853

Counsel(s) For Respondent
Mr. Joseph E. Johnston, Jr., Esq.
29 South Brooksville Avenue
Brooksville, Florida 33512
Telephone: (904) 796-5123

QUESTIONS PRESENTED FOR REVIEW

1. Whether the vestiges of the old (segregated) system affect the perfommance, and mental factors of a black teacher, who taught fifteen years in a segregated school; then involuntarily transferred to a predominantly white school, and a second time involuntarily transferred, and later fired from her job?

2. Whether there were violations of fourteenth Amendment rights: The Tenure Act, Due Process Of Law, scarcity of blacks in decision-making positions, wrongful discharge from employment?

3. Whether the time of initial surfacing of a charge of racial discrimination and discrimination in general can render the case baseless?

4. Whether the trial court or the

appeals Court should have received and given effect to evidence of the intent of the local officials to discriminate or harm the petitioner, and what "punitive" monetary damages should be awarded her?

5. Whether an arbitrator sitting for a binding arbitration hearing (1975) had decision-making jurisdiction over a charge of racial discrimination or discrimination in general?

6. Whether the Record of trial action and the court reporter transcript can be over perfected by counsels for all parties and the Judge sitting to hear the case?

7. Whether the United States Court Of Appeals, Eleventh Circuit sanctioned the findings of fact of the United

QUESTIONS PRESENTED FOR REVIEW

States District Court, Middle District, Tampa, Florida after pointing out or being informed of the improprieties?

8. Whether the pretext factor of a Title VII action is vague to the extent that proof varies from Court to Court, and it was misapprehended in this case?

9. Whether counsel for the District School Board violated Fifth Amendment rights of the Petitioner when he used her as the Defendant's witness in "chief", alibi defense, self-incrimination, as well as a denial of Due Process Of Law?

LIST OF PARTIES TO THE PROCEEDING

Theressa R. Johnson, Petitioner.

District School Board Of Hernando County, Florida, Respondent.

TABLE OF CONTENTS

Topics	Pages
Questions Presented for Review- - - - - - - -	i - iii
List of Parties	iv
Table of Contents- - - - -	v - vi
Authorities	vii -viii
References- - - - - - - -	1 - 2
Statement of Jurisdiction	3
Constitutional Provisions- - - - - - - -	4
Statement of the Case	5 - 17
Argument- - - - - - - - -	18 - 28
Conclusion	29

APPENDIX

Findings of Fact by Federal District Court, Tampa, Florida (F.D.C.)- -	6a - 19a
Opinion of United States Court of Appeals, 11th, Cir. dated March 1, 1983	1a - 5a

TABLE OF CONTENTS

Topics	Pages
Order on Post Trial Motion by Federal District Court, Tampa, Florida, dated March 12, 1982- - - - - -	20a - 21a
Order on Petition by Federal District Court, Tampa, Florida, dated May 6, 1982	22a - 23a
Judgment - Mandate, dated April 26, 1983, by United States Court of Appeals, 11th Cir.- - - - - - - - - -	24a - 25a
Judgment by Federal District Court, Tampa, Florida, dated January 7, 1982	26a - 27a
Order Denying Petition for Rehearing by United States Court of Appeals, 11th Cir., dated March 29, 1983- - - - - -	28a
Order Extending Time to File Petition for Writ of Certiorari in the Supreme Court of the United States	29a

TABLE OF AUTHORITIES

	Page(s)
Cuthill v. Ortman - Miller Mach. Co., C.A. Ind. 1954, 216 F.2d 336	27
Domingo v. New England Fish Co., D.C. Wash. 1977, 445 F. Supp. 421	19
Furness, Withy and Co. v. Carter, C.A. Wash. 1960, 281 F.2d 264, 1 A.L.R. 3d 636	24
Green v. Brown, C.A., N.Y. 1968, 398 F.2d 1006	27
Jackson v. City Of Killeen, 654 F.2d 1181 (5th Cir.) 1981	21
Johnson v. Bennett, Iowa 1968, 89 S. Ct. 436, 393 U.S. 253, 21 L. Ed. 2d 415, 414 F.2d 50.	28
McDonnell Douglas Corp. v. Green, Mo. 1973, 93 S. Ct. 1817, 411 U.S. 792, 36 L. Ed. 2d 668	27
Pub. L. 88 - 352, Title VII, sec. 703, July 2, 1964, 78 Stat. 255	26
Pub. L. 92 - 261, sec. 8 (a), (b), Mar. 24, 1972, 86 Stat. 109	26
Rule 10 (e) of Appellate Procedure	23

TABLE OF AUTHORITIES

	Page(s)
Rule 44 of Appellate Procedure	23
Thomson Spot Welder Co. v. Ford, Mich. 1924, 44 S. Ct. 533, 265 U.S. 445, 68 L. Ed. 1098	28

REFERENCES

1. Filed with the United States Court of Appeals for the Eleventh Circuit:

a. The two similar letters Mr. Donato wrote to Dr. Austin stating his recommendations to fire Mrs. Johnson.

b. The two similar lists of particulars that the School Board's attorney gave to Mrs. Johnson and her counsel appointed by the Florida Teaching Profession (FTP).

c. The School Board's Order dated September 15, 1976.

d. The Report of the Hearing Officer appointed by the State Board of Education, dated March 15, 1977.

e. The First District Court of Appeals, State of Florida's Order.

f. The Right To Sue Notice obtained through the Equal Employment Opportu-

nity Commission.

g. The pre-trial stipulation.

Federal District Court, Tampa, Florida.

h. Briefs and exhibits.

Appellant's brief, reply brief, and post-trial exhibits.

i. The findings of fact by the Federal District Court, Tampa, Florida. (Appendix)

j. Order of Federal District Court, Tampa, Florida dated March 12, 1982. (Appendix)

k. Order of Federal District Court, Tampa, Florida dated May 6, 1982. (Appendix)

STATEMENT OF JURISDICTION

On March 1, 1983 the United States Court Of Appeals, Eleventh Circuit entered an opinion affirming the judgment of the United States District Court, Middle District, Tampa, Florida. (Appendix)

On March 29, 1983 the United States Court Of Appeals, Eleventh Circuit entered an order denying the petition for rehearing. (Appendix)

On April 26, 1983 the United States Court Of Appeals, Eleventh Circuit issued a judgment (mandate). (Appendix)

The Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 et. seq., and Rule 17 of the Supreme Court Of The United States.

CONSTITUTIONAL PROVISIONS

1. United States Constitutional,

Amendment XIV:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ... Due process of Law also...

2. United States Constitution, Amendment V:

No person shall be deprived of life, liberty, or property, without due process of Law; nor shall private property be taken for public use, without just compensation.

The continuing contract was the private property of Theressa R. Johnson.

....protection against self-incrimination....

STATEMENT OF THE CASE

The Petitioner (Plaintiff-Appellant in the federal courts below), former black teacher of mathematics with the Respondent (Defendant-Appellee in the federal courts below) brought action charging racial discrimination and discrimination in general in her involuntary transfer from Hernando High School to Springstead Junior High School in August, 1975. She also charges racial discrimination and discrimination in general in her dismissal in May, 1976.

The Petitioner is a citizen of the United States Of America and a resident of Hernando County, Brooksville, Florida. She was an employee of the Respondent when certain discriminatory acts were done against her based on racial animus.

STATEMENT OF THE CASE

The Respondent is a branch of the State of Florida, Department of Education, an agency of the State Government with its principal place of business in Brooksville, Florida and is an employer within the meaning of 42 U.S.C. section 2000e (B).

This civil case is brought on pursuant to the jurisdiction of the court of first instance in 42 U.S.C. sections 1981 et. seq., 1983 et. seq., and 2000e et. seq.; also 28 U.S.C. section 1343 (4).

This is a suit in equity authorized and instituted pursuant to the Civil Rights Act of 1866, the Civil Rights Act of 1871, and Title VII of the Civil Rights Act of 1964. The case is private individual non-class action.

STATEMENT OF THE CASE

The petitioner, who holds a masters degree in mathematics education, taught mathematics for the Respondent twenty-three consecutive years, and was awarded a continuing contract after her first three consecutive years of employment.

The petitioner worked as a teacher of mathematics at Moton Elementary - Junior High - High School (segregated system), in the High School section from October, 1953 to June, 1968. Moton High School was located in Brooksville, Florida. She was transferred from Moton High School to Hernando High School (predominantly white) effective August, 1968, because Moton High School was being phased out as the Respondent acted to satisfy federal integration guidelines.

STATEMENT OF THE CASE

The Petitioner taught mathematics at Hernando High School in Brooksville, Florida until June, 1975. Effective August, 1975 she was involuntarily transferred the second time, this time to the newly built Springstead Junior High School in Springhill, Florida.

The Petitioner fought the second transfer through binding arbitration because it violated her collectively bargained contract, which included the following article:

> Involuntary transfers will be made on the basis of the needs of the best educational program and upon the individual's qualifications, certification, and years of service in the school building.

Other teachers were transferred based on having fewer years of service in the

school building. The Petitioner was "singled out" and transferred because of her higher number of years of service in the school building -- added to her number of years teaching in the segregated school. (total teaching experience). Disparate treatments and a due process violation, by the Respondent, and against the Petitioner.

The arbitrator found for the Respondent an award. (August, 1975). The Petitioner went to Springstead Junior High School binded to teach there for the term, 1975 - 76. When she was fired before the binding time expired, her binding arbitration agreement was broken. A breach of agreement and a wrongful discharge (dismissal) from employment.

STATEMENT OF THE CASE

While working at Springstead Junior High School the following took place:

> The Petitioner will be referred to as Mrs. Johnson, and the Respondent will be referred to as the School Board, and names of others involved in that instance will be stated.

1. December 15, 1975 a misunderstanding, in Mr. Donato's office (principal who recommended that Mrs. Johnson be fired), with Mrs. Hale, the guidance counselor. A white woman.

2. January 19, 1976 a misunderstanding with Miss Dyess, math department head. A white woman. Mr. Donato accused Mrs. Johnson, the black woman, of frustrating Miss Dyess. He wrote a letter of reprimand and put it in Mrs. Johnson's personnel file. Disparate treatments.

3. January 26, 1976 the first evaluation of Mrs. Johnson, by Mr. Donato, a week after the gripes with Miss Dyess a white teacher.

4. February 12, 1976, Mrs. Traub, Assistant Superintendent of schools, evaluated Mrs. Johnson because Mr. Donato asked her to. Mr. Donato rejected her evaluation because it was favorable to Mrs. Johnson.

5. March 16, 1976, Mr. Donato evaluated Mrs. Johnson again. On March 23, 1976 he discussed the evaluation with Mrs. Johnson. They argued about it; he said he would evaluate her as much as he wants to. As Mrs. Johnson left the school principal's office, he said (sotto voce) 'I will fix you nigger.' He is a white man.

6. April 2, 1976 the first conference with Mrs. Palma Carlozzi, mother of Christine Carlozzi, Christine had been disturbing Mrs. Johnson's class.

7. April 22, 1976, Mrs. Johnson received a letter from Mr. Donato, Christine Carlozzi was removed from Mrs. Johnson's math class.

8. April 26, 1976 the second conference with Mrs. Carlozzi, Christine's math problem had been solved, but the mother was there to discuss a personal problem her daughter told her about. Mrs. Carlozzi walked out of the conference, said she was going to take the problem to the Superintendent of schools.

9. April 27, 1976, Mrs. Johnson's name was on the list to continue teaching at the Springstead School for the next term.

10. May 4, 1976 a letter to Mrs. Johnson from Mr. Donato, he had sent Mrs. Carlozzi's note about the personal problem to the Superintendent of Schools. He also wrote of a note from Mr. Schaub, father of Doug Schaub. He was concerned about his son's math. Mrs. Johnson have never seen nor does she know Mr. Schaub.

11. May 7, 1976, Mr. Donato evaluated Mrs. Johnson again. He discussed the evaluation with her on May 10, 1976. He had observed her doing a good job of teaching, but he called into his office six of the ninth graders of that class and discussed Mrs. Johnson with them. Mr. Donato told Mrs. Johnson that he was going to recommend that she be dismissed from her teaching position at the next school board meeting.

12. May 11, 1976, Mrs. Johnson was afforded a copy of a letter Mr. Donato had written to Dr. Austin, Superintendent of Schools, in it he was recommending that she be dismissed from her job, effective May 18, 1976 at 3:05 P. M.. But, he gave no explicit charge.

13. May 18, 1976 in a regularly scheduled meeting, beginning after 7:00 P.M. the School Board approved Mr. Donato's recommendation that Mrs. Johnson be dismissed from her teaching position, effective May 18, 1976 at 3:05 P.M..

14. August 10, 1976, Mrs. Johnson had a one day public hearing before the School Board. The School Board would not agree to a continuance.

15. September 15, 1976 by written order the School Board made Mrs. Johnson's dismissal from her job permanent.

A notice of Appeal was filed with the Department of Education, Florida on October 7, 1976, pursuant to section 231.36 (6), Florida statutes, and Rule 6A - 1.691, Florida Administrative Code, seeking review of the School Board's Order by the State Board. The Hearing Officer appointed by the State Board issued her Report on March 15, 1977, suggesting that the School Board's Order be sustained. On May 3, 1977, the State Board entered an Order affirming the School Board's September 15, 1976 Order.

STATEMENT OF THE CASE

A petition for review from Administrative Order of the School Board of Hernando County and the State Board of Education, State of Florida was filed in the First District Court Of Appeals, State Of Florida, on September 15, 1977. At some point in time between September 15, 1977 and December 16, 1977 the First District Court Of Appeals, State Of Florida issued an Order Affirming the School Board's Order of September 15, 1976.

Counsel that represented Mrs. Johnson at the county level and the state level informed her of the Supreme Court of Florida's denial of her petition for review with that court. Mrs. Johnson was never given a copy of these documents.

To the best of her knowledge, she has exhausted all remedies for redress on the local and state levels.

At all level actions Mrs. Johnson sought reinstatement to her job with full back pay from the date of her permanent dismissal to the date of reinstatement.

Mrs. Johnson have not been employed since May 18, 1976. She needs a good reference letter from her last employer. But, her last employer fired her by a well planned, expertly executed allegation of incompetency. Prospective employers do not look at all toward an applicant with a charge of incompetency against her. Mrs. Johnson says, 'I am not incompetent, nor have I ever been.'

ARGUMENT

The Non-jury trial began shortly after 2:00 P.M. on the 6th day of January, 1982 with the Honorable Judge Anthony A. Alaimo (Chief Judge, United States Court, Southern District of Georgia) sitting by designation, and agreeing to hear the case. Held in the Honorable Judge WM. Terrell Hodges's court of the United States District Court, Middle District, Tampa, Florida.

Theressa R. Johnson, Plaintiff,

versus

District School Board Of Hernando County, Florida, Defendant.

Case No. 79 - 0921 - Civ-T-H in the Federal District Court, Tampa, Florida, and Case No. 82 - 5195, Non-Argument Calendar in the United States Court of Appeals, Eleventh Circuit.

ARGUMENT

The Plaintiff was represented by Dominic J. Baccarella, Esq. The Defendant was represented by Joseph E. Johnston, Jr., Esq., counsel and John W. Bowen, Esq., co-counsel.

The Plaintiff testified about the disparate treatments from Mr. Yungmann, school principal who recommended the second transfer. She told of the disparate treatments from Mr. Donato, school principal who recommended the dismissal.

> Hiring and transferring procedures which depend almost entirely on subjective evaluation and favorable recommendation of immediate foreman constitute ready mechanism for discrimination.

Domingo v. New England Fish Co., D.C. Wash. 1977, 445 F. Supp. 421.

The Plaintiff testified as to not

receiving a copy of the letter of recommendation for her dismissal that the Defendant approved on May 18, 1976.

The Plaintiff's rebuttal of the list of particulars that based the charge of incompetency prevailed. The trial Judge said she demonstrated herself to be a highly intelligent woman. He found her competent. Dr. Austin, superintendent of Hernando County Public Schools testified, 'she (plaintiff) was a qualified, experienced math teacher.' Yet, the United States District Court, Middle District, Tampa, Florida said she failed to show incompetency to be a pretext. What else did she need to do? She contends that she made out a prima facie case of racial discrimination.

ARGUMENT

In the Jackson v. City of Killeen case, the United States District Court for the Western District of Texas, Clyde F. Shannon, Jr., J.,,rendered judgment for Patricia A. Jackson, Plaintiff. In the Court of Appeals, Gee, Circuit Judge, held that although Plaintiff made out prima facie case she failed to show that articulated reason for discharge, i.e., incompetence, was a mere pretext for discrimination. The judgment was reversed.

> Jackson v. City of Killeen, 654 F .2d 1181 (5th Cir.) 1981.

The Courts must be checked to see if there is uniformity in the "pretext" determination.

At the dismissal hearing before the Defendant, no concrete evidence was presented to show that the Plaintiff

was less than a satisfactory teacher. The evidence was testimonies of witnesses:

School principal Donato, Assistant principal Chorvat, Superintendent Austin, Guidance counselor Hale, three parents, five students, and three teachers (former co-workers of Plaintiff). A total of fifteen witnesses for and before the Defendant at the August 10, 1976 public hearing. No witness in his/her testimony made a statement about the Plaintiff's ability nor inability to teach. The five students testified about, 'no help with our class work or not enough help with our class work, or no textbook to carry home to study from.

The Defendant had a policy of backing administrators, and no written

policies for hiring, transferring, and firing teachers. The Plaintiff was fired in an arbitrary, discriminatory, and capricious manner. The Defendant sat as the trier of the case while being a party of the case.

The United States Court Of Appeals, Eleventh Circuit was informed about the Court Reporter Transcript (Record) of the trial in the Federal District Court and under Rule 10 (e) of Appellate Procedure could have called for correction or modification of the Record, but apparently did nothing. The Plaintiff sent constitutional questions to the United States Court Of Appeals, Eleventh Circuit and under Rule 44 of Appellate Procedure it could have certified them to the Attorney General, but apparently

did not.

The United States District Court, Middle District, Tampa, Florida in its findings of fact 13 (3), 'In this case, assuming, without deciding, that the Plaintiff has made a prima - facie case --- this should have been definitely decided. The preponderance of the evidence is not necessary, the complainant need only demonstrate that the alleged nondiscriminatory basis for firing was merely a pretext for discrimination. The federal trial court's findings run clearly contrary to the preponderance of evidence.

Furness, Withy and Co. v. Carter, C.A. Wash. 1960, 281 F.2d 264, 1 A.L.R. 3d 636.

The ultimate issue of intent was not

decided, and mitigation to determine punitive damages was not decided. The Plaintiff suffered and still suffer mental distress and anguish because of the wrongful discharge, also from such invidious discrimination.

This being an equity suit, the Federal District Court should have judged closely the credibility of the witnesses. Three of the Defendant's witnesses gave contradictory testimonies about the black quota H.E.W. (former Health, Education, and Welfare) transfer need. Dr. Austin, superintendent of Hernando County Public Schools, may have committed perjury in his efforts to refute racial discrimination in the second involuntary transfer. The Sch-

ool Board was under no obligation to do a racial, quota balance.

Pub. L. 88 - 352, Title VII, sec. 703, July 2, 1964, 78 Stat. 255.

Pub. L. 92 - 261, sec. 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

The Federal Integration Guidelines never specified the sex nor the subject area in a black, racial quota balance. When the Plaintiff was transferred because Mr. Donato need, 'a black, female teacher of mathematics' her sex was made a part of her continuing employment and she was sexually discriminated against.

The attorneys for both parties engaged themselves in an entrapment intended to degrade the Plaintiff's good moral character.

ARGUMENT

> Where attorney connives at his client's defeat; sells out his client's interest to the other side, a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing.

Cuthill v. Ortman - Miller Mach. Co., C.A. Ind. 1954, 216 F. 2d 336.

The misconduct charge, the attorneys blanketly inserted into the complaint and the pre-trial stipulation, is in the absence of proof ...

> is a kind of artificial, arbitrary and unnecessary barrier to Plaintiff's reinstatement to her job.

McDonnell Douglas Corp. v. Green, Mo. 1973, 93 S. Ct. 1817, 411 U. S. 792, 36 L. Ed. 2d 668.

The Rule that an order will not be reversed upon a point first raised upon appeal is <u>not</u> absolute.

Green v. Brown, C.A., N.Y. 1968, 398 F. 2d 1006.

The Rule of concurrent findings of

fact by two courts below will not ordinarily be disturbed, will not be applied strictly. Hence, is not absolute.

Thomson Spot Welder Co. v. Ford, Mich. 1924, 44 S. Ct. 533, 265 U.S. 445, 68 L. Ed. 1098.

When counsel for the Defendant used the Plaintiff as his first witness in "chief", he denied her due process of law.

> The court must consider, inter alia, the constitutionality of alibi instruction which petitioner alleged had denied him due process of law by placing on him the burden of proving the alibi defense.

Johnson v. Bennett, Iowa 1968, 89 S. Ct. 436, 393 U.S. 253, 21 L. Ed. 2d 415, on remand 414 F. 2d 50.

CONCLUSION

For the foregoing reasons, petitioner, Theressa R. Johnson requests that a WRIT OF CERTIORARI be granted.

Respectfully submitted, this _____ day of July, 1983.

By Theressa R. Johnson
Theressa R. Johnson, Pro-se

Joseph E. Johnston, Jr.
Counsel for the Respondent

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Theressa R. Johnson,
Plaintiff-Appellant,

versus

District School Board of Hernando County, Florida,
Defendant-Appellee.

Case No. 82 - 5195
Non-Argument Calendar

Entry date, March 1, 1983

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Before: Godbold, Chief Judge, Fay and Clark, Circuit Judges.

PER CURIAM:

Theressa Johnson filed this action in the district court, claiming that the District School Board of Hernando County discriminated against her in employment on the basis of race, in violation of 42 U.S.C. sections 1981,

1983, and 2000e, et seq. In a pretrial stipulation, the action was narrowly defined as a charge of racial discrimination in the termination of a continuing contract teacher. This sole issue was tried before the court without a jury. The trial court found as a matter of fact that Mrs. Johnson "failed to show by a preponderance of the evidence that the School Board's decision to terminate her employment was in any way based upon her race." Trial Transcript, Vol. 2 at 82. The court assumed, without deciding, that Mrs. Johnson made out a prima facie case of discrimination. The court then held that the School Board demonstrated the discharge was based on incompetency and that Mrs. Johnson failed to show, by a preponderance of the evidence, that the

School Board's articulated reasons for discharging her were purely pretextual. Trial Transcript, Vol. 2 at 82. Accordingly, the court entered judgment for the School Board, finding that Mrs. Johnson failed to demonstrate, by a preponderance of the evidence, that the discharge was based on racial discrimination.

In our appellate review of a Title VII case, this court's task is "to determine whether the trial court's finding that the plaintiff failed to carry his burden of persuasion is clearly erroneous in light of all the evidence." Smith v. Georgia, 684 F.2d 729, 734 (11th Cir. 1982), citing Pullman-Standard v. Swint, ___ U.S. ___, 102 S. Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). In a section 2000e case, where the district court has allowed both parties

to put on their full proof, the ultimate issue of fact is whether the plaintiff was intentionally discriminated against. Smith v. Georgia, 684 F.2d at 734. Mrs. Johnson's complaint cited 42 U.S.C.sections 1981 and 1983 as a basis for relief in addition to 42 U.S.C. section 2000e-5. Our court has held that when section 1981 is used only as a companion remedy to section 2000e, the elements of proof under the two statutory provisions are identical. Whiting v. Jackson State University, 616 F.2d 116, 121 (5th Cir. 1980).

Thus, the sole issue before us is whether the district court's finding that Mrs. Johnson's termination was not racially motivated is clearly erroneous. The briefs also discuss Mrs. Johnson's initial transfer to Spring-

stead Junior High School and the possibility that the transfer was racially motivated. Because that issue was not litigated or decided in the district court, we cannot review it on appeal. A review of the record supports the district court's findings in this case. Consequently, we must affirm the district court's order granting judgment for the School Board.

AFFIRMED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Theressa R. Johnson,
Plaintiff,

versus

District School Board of Hernando County, Florida,
Defendant.

Case No. 79 - 0921-Civ-T-H

Argued, January 6 and 7, 1982
Decided, January 7, 1982.

Entry date, January 7, 1982

Before: Anthony A. Alaimo, Chief Judge, Southern District of Georgia, sitting by designation.

THE COURT: Well, there is no reason for me to delay my findings here, for it would serve no useful purpose to either of the parties. So, I will just orally state my findings of fact and conclusions of law.

This cause came on for trial before

the Court, sitting without a jury, according to the pre-trial stipulation filed by the parties in this case.

Plaintiff's case is that the termination of her employment as a continuing contract teacher in the Hernando County school system, which was effective June 9th, 1976, was not based upon incompetency as asserted, but was racially motivated.

The Defendant School Board's case is that the plaintiff will not be able to show that the School Board was racially motivated in the termination, but,rather, that the record will reflect that the termination was based upon incompetency as determined by the Hernando County School Board.

Included in the stipulation are the following facts which were admitted by

the parties, requiring no proof at trial, and stated in the pre-trial stipulation filed in the record, and those facts are as follows:

That plaintiff is a citizen and resident of Brooksville, Hernando County, Florida, and was a former employee of the School Board of Hernando County.

Plaintiff was employed by the defendant in October of 1953, and served as a teacher in the Hernando County school system until her termination.

That on or about December the 11th, 1974, the defendant circularzied all teachers within the School District with an announcement of anticipated openings at a new school, the Springstead Junior/ Senior High School, and invited applications for these positions to be entered no later than January 9th, 1975. As of

January the 9th, 1975, the School Board had not received adequate numbers of volunteers to be transferred to the new school, therefore necessitating action by the defendant to effect involuntary transfers.

On or about February the 3rd, 1975, the defendant proceeded to select teachers for involuntary transfers to meet the manpower requirement for the new Springstead Junior/Senior High School. Plaintiff was transferred to the new Springstead Junior/Senior High School, commencing her employment at that school in September of 1975. During that school year, the Plaintiff was repeatedly brought into the principal's office and asked to respond to complaints filed by students, and allegations made by parents against the plaintiff concerning her

ability and lack of communication with the parents.

Plaintiff's employment with the defendant was terminated by the defendant on May the 28th, 1976, with the effective date of June 9th, 1976. Plaintiff's discharge was based upon the ground of incompetency because of insufficient performance, misconduct, lack of willingness to assist students, lack of rapport with students, sincerity and enthusiasm for teaching, and strained departmental relations that might impair the math program of Springstead Junior/Senior High School.

Now, the Court has, on January the 6th, and, today, January the 7th, heard the testimony and examined the proofs offered by each of the parties, and after hearing all the evidence, the

Court makes the following findings of fact:

1. The evidence that I have heard supports the stipulation of fact, entered into by the parties, filed in the record in this case.

2. The Plaintiff, Theressa R. Johnson, a black person, was employed by the defendant, School Board of Hernando County, Florida, in October of 1953, and she served as a teacher in that school system until she was terminated in 1976, a period of some twenty-three years.

3. That for the 1975-1976 school year, Mrs. Johnson was transferred from the Hernando County School to the Springstead Junior/Senior High School, a new school in the Hernando County school system that opened in September of 1975.

Mrs. Johnson objected to this transfer and brought her objection by way of a grievance to arbitration pursuant to a collective-bargaining agreement entered into by the school system of Hernando County and its teachers. The arbitrator found against Plaintiff, that is, Mrs. Johnson, Grievant.

4. That during the 1975-1976 school year, Mrs. Johnson was repeatedly brought into her Principal's office and asked to respond to complaints filed by students, and allegations made by parents against Mrs. Johnson concerning her ability and lack of communication with the students as well as the parents.

5. In May of 1976, the superintendent of schools of Hernando County charged the Plaintiff with incompetency and recommended that her employment be terminated.

6. Mrs. Johnson's employment with the Hernando County school system was in fact terminated by the Hernando County school system on May the 28th, 1976, effective date of June the 9th, 1976.

7. The Hernando County School Board terminated Plaintiff's employment based upon what they genuinely and in good faith felt to be grounds of incompetency because of her insufficient performance, lack of willingness to assist students, lack of rapport with students, and strained departmental relations, which they felt in good faith might impair the math program of the Springstead Junior/Senior High School.

8. That pursuant to the statute of the State of Florida, Mrs. Johnson, as she had a right to, appealed her termination to the State Board of Education,

State of Florida. After reviewing a decision of the County School Board, the Florida Board of Education upheld the decision of the School Board, the termination of Plaintiff's employment, based upon the grounds as stated by the School Board

9. That the Plaintiff, Mrs. Johnson, thereafter, as she had a right to, appealed the decision to terminate her employment which was affirmed by the State Board of Education in the District Court of Appeals of the State of Florida. That court upheld or affirmed the decision to terminate Plaintiff's employment.

10. The School Board's decision to terminate Plaintiff's employment was made only after affording a full trial-type hearing where she was represented by legal counsel, and the hearing, if I

recall it correctly, lasted one entire day.

11. Mrs. Johnson has exhausted all of her administrative remedies under the State laws of the State of Florida.

12. At no time during the proceedings before the School Board or on appeal did Mrs. Johnson or her attorney claim that race played any part in the decision to terminate her employment. I find her testimony to that effect before me yesterday as being of substantial importance in a decision of this case.

13. I find that Plaintiff has failed to show by a preponderance of the evidence that the School Board's decision to terminate her employment was in any way based upon her race.

I conclude as a matter of law as follows:

1. The Court in fact has jurisdiction of this matter under Title 28 of the United States Code, Section 1343, Subparagraph 4, as well as Title 42 of the United States Code, Sections 1981, 1983 and 2000e.

2. In an action for a discrimatory termination of employment, the Supreme Court of the United States, in the case of McDonnell Douglas Corporation vs. Green, 411 United States -- for the reporter, that's page 792 -- set forth the basic allocations of burdens and order of presentation of proof in a Title 7 case, based upon discrimatory treatment, and that allocation has been affirmed recently in the Supreme Court case of Texas Department of Community Affairs vs. Burdine, 101 Supreme Court-- for the reporter, that's page 1089 --

and that allocation of the burden and order of presentation of proof are as follows:

First, that in an action for a racially discriminatory termination of employment, a Plaintiff has the burden of first proving by a preponderance of the evidence a prima-facie case of discrimation.

Second, if the Plaintiff succeeds in proving a prima-facie case, the burden then shifts to the defendant to articulate and produce evidence to show some legitimate, nondiscriminatory reason for the termination of employment.

Third, should the defendant carry this burden, then the Plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons,

but were a pretext for the discriminatory discharge from employment.

3. In this case, assuming, without deciding, that the plaintiff has made out a prima-facie case, defendant has demonstrated that the discharge was based on incompetency, and plaintiff has failed to show by a preponderance of the evidence that the defendant's articulated reasons for discharging her for incompetency were purely pretextural.

Now, in conclusion, I must say that, while the plaintiff, by her demeanor and testimony during the trial of this case, has convinced this Court that she is a highly intelligent and articulate woman, she has failed to convince the Court by a preponderance of the evidence that the discharge was based on racial discrimination.

Accordingly, let a judgment for the defendant be entered.

Any further findings that need to be made?

MR. JOHNSTON: No, Your Honor.

MR. BACCARELLA: No, Your Honor.

THE COURT: Court is recessed.

(Thereupon, this proceeding was concluded at 11:00 a.m.)

ORDER ON POST TRIAL MOTION TO ENTER PLEADINGS NOT PRESENTED AT THE TRIAL OR WERE INADEQUATELY PRESENTED BECAUSE OF THE BREAK-DOWN IN COUNSEL - CLIENT RELATIONS, BEYOND THE CLIENT'S CONTROL

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

Theressa R. Johnson,
Plaintiff,

v.

District School Board of Hernando County,
Defendant.
Case No. 79 - 921-Civ-T-H
Decided, March 12, 1982

Entry date, March 17, 1982

Before: Anthony A. Alaimo, Chief Judge
Southern District of Georgia,
by designation.

O R D E R

This case is presently before the Court on the Plaintiff's motion to supplement the record with additional evidence which was not introduced at trial.

The Court hereby GRANTS the motion of the Plaintiff to supplement the record with additional evidence, and ORDERS the attached pleadings to be added to the record.

SO ORDERED. this 12 day of March, 1982.

Signed by Judge Alaimo.

ORDER ON PETITION (new notice of appeal), THE SECOND EFFECTIVE NOTICE OF APPEAL, MISCONSTRUED BY THE COURT

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

Theressa R. Johnson,
Plaintiff,

v.

District School Board of Hernando County,
Defendant.
Case No. 79 - 921-Civ-T-H
Decided, May 6, 1982

Entry date, May 10, 1982

Before: Anthony A. Alaimo, Chief Judge
Southern District of Georgia,
by designation.

O R D E R

On January 7, 1982, a final judgment in favor of the defendant was entered by this Court in this Title VII action. On March 24, 1982, the Plaintiff filed a "petition for review and/

or oral arguments that may change the judgment in this case ...." Allowing a liberal construction befitting a pleading filed pro se, the Court construes the pleading as a motion for new trial or for judgment notwithstanding the verdict. See Fed R. Civ. P. 50(b), 59 (a). However, the motion was not filed within ten days of the entry of judgment as is required by Federal Procedure Rules 50(b) and 59(b) and therefore the Court DENIES the motion for lack of power to grant any post-trial relief of this kind. See 6A Moore's Federal Practice paragraph 59.09 3 ,(1973).

SO ORDERED, this 6th day of May, 1982.

Signed by Judge Alaimo.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Theressa R. Johnson,
Plaintiff-Appellant,

versus

District School Board of Hernando County, Florida,
Defendant-Appellee.

Case No. 82 - 5195
Non-Argument Calendar
D.C. Docket No. 79 - 0921-Civ-T-H

Issued as Mandate: Apr 26 1983

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Before: Godbold, Chief Judge, Fay and Clark, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant

to Rule 23;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED;

March 1, 1983

It is further ordered that Plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA - TAMPA DIVISION

Theressa R. Johnson,
Plaintiff,

v.

District School Board of Hernando County,
Defendant.

Case No. 79 - 921-Civ-T-H

Entry date, January 7, 1982

Before: Anthony A. Alaimo, Chief Judge, Southern District of Georgia, by designation.

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Anthony A. Alaimo, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff take nothing, that the action

be dismissed on the merits, and that the defendant District School Board Of Hernando County recover of the plaintiff Theressa R. Johnson its costs of action.

Dated at Tampa, Florida ,this 7th day of January, 1982.

Wesley R. Thies
Clerk of Court

by James C. Gordon, Sr.
Deputy Clerk

MICROFILMED.ROLL NO. 81

ORDER DENYING PETITION FOR REHEARING BY THE PANEL OF JUDGES

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Theressa R. Johnson,
Plaintiff-Appellant,

versus

District School Board of Hernando County,
Defendant-Appellee.

Case No. 82 - 5195
Non-Argument Calendar

Entry date, March 29, 1983

Appeal from the UNITED STATES DISTRICT COURT for the Middle District of Florida

Before: Godbold, Chief Judge, Fay and Clark, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied. ENTERED FOR THE COURT: Thomas A. Clark, United States Circuit Judge.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

No. A-983

THERESSA R. JOHNSON,
Petitioner,

v.

DISTRICT SCHOOL BOARD OF HERNANDO COUNTY,
Respondent.

Entry date, June 9, 1983

UPON CONSIDERATION of the application of Petitioner, It Is ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 26, 1983.

/S/ Lewis F. Powell
Associate Justice of the Supreme Court of the United States

Dated this 9th day of June, 1983

CASE NO. 83-148

AUG 31 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THERESSA R. JOHNSON,	)
Petitioner,	)
vs.	)
DISTRICT SCHOOL BOARD OF HERNANDO COUNTY, FLORIDA.	)
Respondent.	)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROPPRKALL AND WAIVER OF RIGHT TO FILE BRIEF

COMES NOW, the Respondent, District School Board of Hernando County, Florida, by and through its undersigned attorney, and expressly waives the right to file a brief in opposition to the Petition for Certiorari filed herein, expressly reserving, however, the right to file a Brief on the merits in the event the Petition is granted.

JOHN W. BOWEN, ESQUIRE, OF
Kennedy and Melvin, P.A.
Suite 402 Barnett Bank Tower
2929 E. Commercial Blvd.
Fort Lauderdale, Florida 33308
Telephone: 776-0660
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to THERESSA R. JOHNSON, Petitioner, 810 Saint Francis Street, Brooksville, Florida 33512, this 29th day of August, 1983.

JOHN W. BOWEN

CASE No. 83 - 148

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RECEIVED
SEP 6 - 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

XI 29 PAGE R4

Theresaa R. Johnson,
petitioner,

versus

District School Board of Hernando County, Florida,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Response To Respondent's Waiver Of Right To File a BRIEF IN OPPOSITION to the PETITION for writ of certiorari.

In accordance with Rule 22(4) of the Supreme Court of The United States the respondent may express waiver of the right to file a brief in opposition to the petition. But, the respondent have no reserved right to file an opposition brief on the merits in the event the petition is granted.

It is not clear whether Mr. John W. Bowen can make such waiver for the respondent. He was not counsel for the respondent when the petition was filed, Mr. Joseph E. Johnston was counsel at that time. A corporation should not switch back and forth with its attorneys in the same case. It should (for fairness to the opposeing party) choose the one or the two to litigate in its behalf at the beginning of the lawsuit, and continue with same for written documents.

Mr. John W. Bowen is seeking appearance at the time he expresses the waiver of right. He may or may not be permitted to appear for oral argument. A permit for his appearance is up to the discretion of the Court.

When the time for respondent's filing of a brief in opposition expires, the petitioner is asking that the Clerk distribute to the Court (When it begins its annual Term in October, 1983) the petition with the expressed statement, 'Counsel(s) for the respondent filed no opposition to the petition.'

Theressa R. Johnson, Pro Se
Petitioner
810 Saint Francis St.
Brooksville, Florida 33512
Telephone:(904) 796-2853

PROOF OF SERVICE

I hereby swear that a copy of this response have been served on counsel(s) for the respondent by enclosing it in an envelope, first class postage prepaid, addressed to:

Mr. Joseph E. Johnston, Jr. Esq.
29 South Brooksville Avenue
Brooksville, Florida 33512

and

Mr. John W. Bowen, Esq.
Suite 402 Barnett Bank Tower
2929 E. Commercial Blvd.
Fort Lauderdale, Florida 33308

and depositing same in the United States Mails on this first day of September, 1983.

By Theressa R. Johnson
Theressa R. Johnson, Petitioner